TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members. The ACLU was founded over seventy-five years ago to preserve and protect the fundamental principles of the Bill of Rights. It has appeared in numerous cases seeking to vindicate the deprivation of federally protected rights. *Amici* believe that if federal courts are to remain the paramount protectors of such rights, the doctrine enunciated by the Court in *Ex Parte Young*, 209 U.S. 123 (1908), must be reaffirmed. We respectfully submit this brief in the hope of assisting the Court as it considers the important issues presented by this case.

STATEMENT OF THE CASE

In 1991, the Coeur d'Alene Indian Tribe (the "Tribe") filed suit in the United States District Court for the District of Idaho against the State of Idaho, several state agencies and several state officials, including the members of the state Board of Land Commissioners. It sought quiet title to all submerged lands within the boundaries of its reservation, including Lake Coeur d'Alene, and declaratory and injunctive relief precluding state agencies and officials from regulating and interfering with its possession of the disputed property. The Tribe claimed title to the land pursuant to unextinguished aboriginal rights and an Executive Order, signed by President U. S. Grant on November 8, 1873, and ratified by Congress in 1891. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244, 1247 (9th Cir. 1994).

Pursuant to Fed.R.Civ.P. 12(b), Idaho moved to dismiss the Tribe's complaint, arguing that the Tribe's action was

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

barred by the Eleventh Amendment and that the Tribe had failed to state a claim on which relief could be granted. By Order dated July 20, 1992, the district court granted Idaho's motion, dismissing the Tribe's suit in its entirety.

The district court concluded that the Eleventh Amendment barred all claims against Idaho and its agencies, and the claims for quiet title and declaratory relief against the state officials. *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F.Supp. 1443, 1446-9 (D. Idaho 1992). The court reasoned that the state officials were entitled to immunity with respect to the quiet title and declaratory relief claims because they were the functional equivalent of damages claims against Idaho. *Id.* at 1448-49, *citing Edelman v. Jordan*, 415 U.S. 651 (1974). Although the district court found that the officials were not entitled to sovereign immunity with respect to the Tribe's claims for injunctive relief, it nevertheless dismissed them after finding, as a matter of law, that Idaho had a right to possess the land at issue. 798 F.Supp. at 1452.

The Tribe appealed, and the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 42 F.3d at 1247-48. It agreed that the Eleventh Amendment bars all claims against Idaho and its agencies, as well as the quiet title claim against the officials. It found, however, that the Eleventh Amendment did not bar the Tribe's claims for declaratory or injunctive relief against the officials. Relying on this Court's plurality decision in *Florida Dep't Of State v. Treasure Salvors, Inc.*, 458 U.S. 679 (1982), it held that these claims were not claims for monetary damages, but only sought to preclude future violations of federal law and were therefore permissible under *Ex Parte Young* and its progeny.

It further found that it was conceivable that the Tribe could prove facts that would entitle it to the relief that it sought. Thus, it reversed the district court's dismissal of the

injunctive claims against the state officials and remanded the case back to the district court.[2] 42 F.3d at 1257.

This Court granted *certiorari* on April 16, 1996. This brief is limited to the question of whether the Eleventh Amendment bars the Tribe's action against the state officials for declaratory and injunctive relief.

SUMMARY OF ARGUMENT

The Tribe's claims against Idaho state officials for declaratory and injunctive relief fall squarely within the exception to the Eleventh Amendment articulated by the Court in *Ex Parte Young*. Under the *Young* doctrine, the Eleventh Amendment does not bar a federal court from adjudicating a claim for prospective declaratory and injunctive relief against state officials who allegedly act contrary to federal law. Here, the Tribe claims that Idaho state officials, by regulating and administering the land in question, are violating federal law. They are intruding on property rights conferred on the Tribe by a federal statute. The relief sought by the Tribe is prospective, as opposed to retrospective, in nature. It seeks to prevent further violations of its property rights. It does not seek damages or restitution for past wrongs, nor does it seek to rescind a past transfer of property.

Idaho state officials argue that the *Young* doctrine does not apply to this action, or to any action involving real property. More specifically, they contend that real property actions against state officials should be barred by the Eleventh

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[2] Between the Ninth Circuit's issuance of its opinion and this Court's granting of *certiorari*, the United States filed suit against the State of Idaho on behalf of the Tribe, seeking to quiet title to approximately a third of the land covered by the Tribe's suit. *United States v. Idaho*, No. 94-0328 (D. Idaho)(complaint filed July 21, 1994).

Amendment because such suits actually seek to adjudicate the state's interest in or right to property and cannot resolve title disputes. They further contend that they are entitled to Eleventh Amendment immunity in this action because Idaho has a greater right to the disputed property than the Tribe and the Tribe can bring suit against Idaho to quiet title in state court.

Idaho state officials' arguments should be rejected. First, the *Young* doctrine has been used repeatedly to enforce real and personal property rights where, as here, the right to possess the property is founded in federal law or the deprivation of the property raises federal constitutional or statutory concerns. *See, e.g., Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch.) 11 (1815); *United States v. Lee*, 106 U.S. 196 (1882); *Poindexter v. Greenhow*, 114 U.S. 270 (1884); *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891); *Tindal v. Wesley*, 167 U.S. 137 (1897); *Goltra v. Weeks*, 271 U.S. 536 (1926); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670.

Creation of a real property exception to the *Young* doctrine would not only require the Court to overrule 200 years of jurisprudence, but would also seriously jeopardize the federal constitutional right to enjoy, own and dispose of property without undue governmental interference. Those deprived of such a right would not be able to bring suit in federal court to seek vindication.

Second, as this Court has repeatedly recognized, all actions using the *Young* doctrine are actions seeking to adjudicate a state's interests or rights. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Real property actions are no different.

Third, the fact that such suits cannot resolve title disputes is largely irrelevant. Here, as against the state officials, plaintiffs only seek cessation of those of Idaho's regulatory powers that are harmful to the Tribe. Should a court find in favor of plaintiffs and Idaho subsequently wishes to assert its ownership of the property, it may pursue its own remedies. *Lee*, 106 U.S. at 222; *Tindal*, 167 U.S. at 223.

Fourth, the fact that the state officials may ultimately prevail on the merits is also irrelevant. A determination of the merits in order to determine Eleventh Amendment immunity is patently improper. *Treasure Salvors, Inc.*, 458 U.S. at 699-700 (Stevens, J.); *id.* at 703 (White, J.).

Finally, the availability of a state forum does not deprive a federal court of jurisdiction. *Monroe v. Pape*, 365 U.S. 167 (1961); *Zwickler v. Koota*, 389 U.S. 241 (1967). To hold otherwise would mean that federal courts would no longer be the paramount protectors of federal rights. Each individual state legislature could prevent federal courts from adjudicating such rights by enacting some sort of remedial scheme.

Thus, because the Eleventh Amendment does not bar the Tribe's claims against the Idaho state officials, the decision of the Ninth Circuit must be affirmed.

ARGUMENT

I. THE COURT SHOULD NOT CREATE A REAL PROPERTY EXCEPTION TO *EX PARTE YOUNG*

In *Ex Parte Young*, 209 U.S. 123, this Court formally acknowledged the fiction that has permitted litigants to sue states in federal courts for violations of federally protected rights. While recognizing that suits against states seeking to enjoin state action violative of federally protected rights were barred by the Eleventh Amendment, the Court ruled that suits against the state officials responsible for the un-

lawful acts were not barred.[3] The Court reasoned that, in their capacity as sovereigns, states were incapable of authorizing acts that infringe on rights secured by federal constitutional and statutory law, and thus unable to impart immunity to those they entrust with their implementation. *Id.* at 159.

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. at 159-60.

Today, it is widely recognized that the doctrine annunciated in *Young* is "indispensable to the establishment of constitutional government and the rule of law." C. Wright, LAW OF FEDERAL COURTS 312 (5th ed. 1994). *See also* Erwin Chemerinsky, FEDERAL JURISDICTION 393 (2d ed. 1994). The *Young* doctrine establishes the power of federal courts to enforce federal law against state legislative and executive actions. It maintains the supremacy of the United States Constitution and federal statutory law in the face of

[3] Although *Ex Parte Young* involved the deprivation of a constitutional right, there is no doubt that the doctrine established by that case applies also to federal statutory violations. *See Worcester County Trust Co. v. Riley*, 302 U.S. 292, 297 (1937)("[g]enerally suits to restrain action of state officials can . . . be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States"); *Almond Hill School v. United States Dep't of Agriculture*, 768 F. 2d 1030, 1034 (9th Cir. 1985)("a state cannot authorize its officials to act in violation of federal statutory law").

state policy or action that threatens federal instrumentalities or federal programs or is in defiance of constitutional inhibitions. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 105 ("the *Young* doctrine rests on the need to promote the vindication of federal rights"); *Green v. Mansour*, 474 U.S. 64, 68 (1985)("[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law").

Idaho state officials and their *amici* urge the Court to adopt a real property exception to *Ex Parte Young*. They claim that, at least in the real property context, principles of federalism outweigh the rights of individuals to litigate federal constitutional or statutory deprivations in federal court. In essence, the state officials and their *amici* ask the Court to rule that some federal rights are more supreme, and consequently, more worthy of protection than others. Their arguments should be rejected. The Constitution does not prioritize protected rights; neither should the Court. The right to protect real property from unconstitutional takings or takings that violate federal statutory rights should not be relegated to second-class status.

A. The Court Has Repeatedly Sanctioned The Use Of The Officer Suit Doctrine In Actions Seeking Possession Of Real Property

Since its inception in jurisprudence, the officer suit doctrine has been used repeatedly to maintain the supremacy of real and personal property rights where the right to possess the property is grounded in federal law or the deprivation of the property raises federal constitutional or statutory concerns. Although *Young* was not decided until 1908, justification for the doctrine actually dates back nearly as far as the doctrine of sovereign immunity itself. As early as the

13th century, English common law courts distinguished between the King and his servants when applying the doctrine of sovereign immunity. *See* Louis L. Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L.Rev. 1, 9 (1963). This Court acknowledged its existence in the first cases concerning the application of the doctrine of sovereign immunity to the conduct of state officials.

Although not a property case, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), is viewed as the Court's first acknowledgment of the doctrine. In *Osborn*, the Court upheld the issuance of an injunction preventing Ohio's tax collectors from levying a tax against the Bank of the United States pursuant to an unconstitutional state law. *Id.* at 860-71. In so doing, it rejected defendants' argument that, because they were state officials acting pursuant to state law, the case was barred by the Eleventh Amendment. Recognizing the need to maintain the supremacy of federal law, the Court stated that, "if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof . . . [it can] furnish no authority to those who took, or to those who received, the money for which the suit was instituted." *Id.* at 859. Stripped of their state authority, the defendants were little more than bank robbers who had taken money "by violence." *Id.* at 741. *See United States v. Peters*, 9 U.S. (5 Cranch.) 115 (1809)(applying officer suit doctrine to a suit involving title to proceeds of the sale of a vessel condemned as a prize of war).

In the property context, the doctrine initially was used to permit adjudication of suits against military officials for possession (as opposed to title) of real property which federal or state governments had seized for military purposes. In each suit, the Court recognized that although the government was not named as a party defendant, the Court was being asked to adjudicate its right to possess the disputed property.

In *Meigs v. M'Clung's Lessee*, 13 U.S. 11, for example, the Court adjudicated a dispute between plaintiffs and military officials in which plaintiffs sought possession of land on which the United States government had erected a garrison at great expense. Although the officials asserted as a defense that they occupied the land at the behest of the United States government, the Court stated that the "the United Sates cannot have intended to deprive [the plaintiff] of [his land] by violence, and without compensation." *Id.* at 18.

In *United States v. Lee*, 106 U.S. 196, the Court held that it had jurisdiction to adjudicate a suit brought by General Robert E. Lee's son to oust federal officials from Arlington, property that had been seized by the United States government pursuant to an order of the Secretary of War. Although defendants ultimately conceded that the Secretary's order was unconstitutional, they claimed that they were entitled to sovereign immunity because they occupied the land at the request of the United States. *Id.* at 204. In rejecting this defense, the Court cited to those Amendments to the Constitution which stated "[t]hat no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." It then reasoned that if it had the power to protect against the seizure of life and liberty by the government through the issuance of writs of habeas corpus to individual government officials, it must also have the right to protect against the seizure of property by the government without just compensation. *Id.* at 218.

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity . . . . It is the only supreme power in our system of government, and every man who, by accepting an office, participates in its functions, is only the

> more strongly bound to submit to that supremacy, and to observe the limitations it imposes . . . .

Id. at 220.[4]

The Court soon moved away from the military context. In *White v. Greenhow*, 114 U.S. 307 (1885), it held that an action against the treasurer of the City of Richmond, Virginia, for the recovery of personal property seized for delinquent taxes, was not barred by the Eleventh Amendment. Because the state statute pursuant to which the treasurer had taken the property was unconstitutional, the action could not be characterized as one against the state for purposes of sovereign immunity. *Id.* at 316-17, *citing Poindexter v. Greenhow*, 114 U.S. 270.

Relying on *Osborn*, the Court in *Pennoyer v. McConnaughy*, 140 U.S. 1, ruled that it could enjoin Oregon state officials from selling land to which the plaintiff claimed title pursuant to a contract with the state. The Court ultimately concluded that the state legislation authorizing the state officials to sell the property was unconstitutional in that it impaired the state's contractual obligations. Because the state could not authorize its officials to commit unconstitutional acts, it could not immunize them from liability for the commission of such acts. *Id.* at 10.

In *Tindal v. Wesley*, 167 U.S. 204, the Court rejected defendants' sovereign immunity defense in an action seeking to recover possession of real property which the State of South Carolina allegedly had seized without affording plaintiffs due process or providing them with just compensation. Defendants argued that, because they had taken possession of the property on behalf of the state, a suit against them was a suit against the state and barred by the Eleventh Amendment. Relying on *Lee*, the Court stated that "[the] Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law." 167 U.S. at 222. *See Scott v. Donald*, 165 U.S. 58 (1897)(Eleventh Amendment did not bar action to restrain state officials from seizing wines and liquors pursuant to state liquor dispensary law where it was alleged that state law was unconstitutional).

In 1908, citing *Osborn*, *Lee*, *Pennoyer*, and *Tindal*, the Court issued its decision in *Ex Parte Young*, itself a property case. In *Young*, shareholders of the Northern Pacific Railway Company sought an injunction preventing Minnesota's attorney general from enforcing legislation setting rates for the transportation of passengers and commodities within Minnesota. Plaintiffs contended that the rates were so low that they were confiscatory and amounted to a deprivation of property without due process. 209 U.S. at 127-132. The defendant claimed that he was entitled to Eleventh Amendment immunity because plaintiffs' action was really against the state. In rejecting this defense, the Court stated:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does

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[4] In their *amicus* brief, the Council of State Governments, *et al.*, wrongly assert that *Lee* and other cases cited herein are really due process cases and hold that the officer suit fiction is unavailable if plaintiffs may seek relief in another forum, such as a state court. Brief of the Council of State Governments, *et al.* ("Council's Brief") at 15-18. Such an argument ignores the plain language of these decisions. In none of these cases does the Court rule that the existence of a state remedy deprives a federal court of jurisdiction. Instead, it repeatedly asserts that the officer suit fiction is available to maintain the supremacy of federal law in the face of state action that violates federally protected rights. *See, e.g.*, *Lee*, 106 U.S. at 218-20.

> not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Id. at 159. *See also Public Service Co. v. Corboy*, 250 U.S. 153 (1919)(state drainage commissioner not entitled to sovereign immunity in an action to enjoin him from diverting water from a river where state law authorizing diversion was allegedly unconstitutional); *Goltra v. Weeks*, 271 U.S. 536 (using the officer suit doctrine to permit adjudication of a case alleging that a United States officer had seized a fleet of towboats and barges leased to plaintiff in violation of plaintiff's due process rights); *Ickes v. Fox*, 300 U.S. 82 (1937)(using officer suit doctrine in an action to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which would have deprived plaintiffs of property rights acquired under Congressional acts, state laws and government contracts).

Because the officer suit doctrine had also been used to remedy common law torts arising under state law,[5] the Court in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), clarified that the rule of law set forth in *Lee* and *Tindal* only applied to those real property disputes raising federal constitutional or statutory concerns. More specifically, the Court found that while a state could not authorize state officials to violate federal law, it could

[5] *See, e.g., Brown v. Huger*, 62 U.S. (21 How.) 305 (1859)(action against military officer to recover possession of the military arsenal at Harper's Ferry, a suit which plaintiff ultimately lost on the merits); *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1868)(suit against a military officer for possession of land set aside for military purposes, another suit which plaintiff ultimately lost on the merits).

authorize them to commit a common law tort. Thus, state officials who committed common law torts were entitled to sovereign immunity, unless that tort also amounted to a violation of a federal constitutional or statutory right.[6] *Id.* at 693, 695. *See Malone v. Bowdoin*, 369 U.S. 643 (1962) (holding that federal court did not have jurisdiction to adjudicate land dispute with federal government because plaintiffs did not allege a violation of federal constitutional or statutory rights).

In 1972, Congress passed the Quiet Title Act, 28 U.S.C. §§1346(f), 1402(d) and 2409(a), in which the United States waived sovereign immunity with respect to real property disputes. Consequently, the officer suit doctrine was no longer necessary to resolve such controversies with the federal government. *See Block v. North Dakota*, 461 U.S. 273 (1983). In 1982, however, the Court affirmed its holdings in *Lee* and *Tindal* as they applied to property disputes involving state governments. In *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, it held that the Eleventh Amendment did not bar the issuance of an arrest warrant requiring state officials to turn over property obtained from a sunken ship. The state could not authorize the officers to retain possession of the property without raising "a

[6] In *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 672 (5th Cir.), *cert. denied*, 115 S.Ct. 577 (1994), the Fifth Circuit erroneously states that *Larson* overruled *Tindal*. As the Ninth Circuit noted in this case,

> *Pennhurst* concludes that to the extent that Tindal was a tort case, it was overruled by *Larson*. However, to the extent that *Tindal* alleged a violation of a federal right, it clearly remains valid. *See Treasure Salvors*, 458 U.S. at 685-89 (Stevens, J., plurality opinion), 706, 102 S.Ct. at 3314-17, 3325 (White, J., concurring and dissenting).

Coeur d'Alene Tribe of Idaho v. Idaho, 42 F.3d at 1252 n.7.

substantial constitutional question." *Id.* at 697.

Thus, the basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect property rights secured and activities authorized by paramount federal law is firmly embedded in our jurisprudence.

B. The Arguments Of The Idaho State Officials And Their *Amici* On Behalf Of A Real Property Exception To *Ex Parte Young* Are Without Merit

Idaho state officials and their *amici* would have this Court overrule almost 200 years of jurisprudence to adopt a real property exception to the *Young* doctrine. They claim that such an exception should be made because suits against state officers for possession of disputed property are really suits against the state. Brief for the Petitioner ("Pet. Brief") at 12-26; Council's Brief at 11-14. They further argue that because it is the state who ultimately claims title to the land, such suits could never ultimately resolve the dispute before the court, *i.e.*, which of the litigants has better title. Brief of the *Amici* States of California, *et al.* ("States' Brief") at 15; Council's Brief at 19-26. Each contention is without merit.

With respect to the first, real property disputes are no different than any other suit in which the *Young* doctrine is employed. All such suits seek to adjudicate a state's interests or rights. Although they may not seek to adjudicate a state's right to possess real property, they could seek to adjudicate a state's right to personal property, *see, e.g.*, *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985)(applying *Young* doctrine to prisoner's claim to a paperback dictionary); *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir.), *cert. denied*, 469 U.S. 1127 (1985)(applying *Young* doctrine to

suit against state officer who had allegedly conspired to revoke plaintiff's medical license); or they could contest the state's right to promulgate certain laws, *see, e.g.*, *American Bank & Trust Co. of Opelousas v. Dent*, 982 F.2d 917 (5th Cir. 1993)(using officer suit doctrine in action seeking declaration that a state statute prohibiting the sale of insurance was unconstitutional); practices, *see, e.g.*, *Armstead v. Coler*, 914 F.2d 1464 (11th Cir. 1990)(applying *Young* doctrine to case in which mentally retarded patients challenged state's failure to provide them with appropriate services); or procedures. *See, e.g.*, *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984)(using *Young* doctrine in suit challenging state system of disbursing benefits to those who had descended from aboriginal inhabitants).

This Court has long recognized that "an official-capacity suit is, in all respects other than name . . . a suit against the [government] entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). As the Court stated in *Pennhurst*, *Ex Parte Young* is "an important exception to [the] general rule" that a suit against state officials that is in fact a suit against a State is barred. *Pennhurst*, 465 U.S. at 101-02. *See Treasure Salvors, Inc.*, 458 U.S. at 685 (Stevens, J.) ("[t]here is a well-recognized irony in *Ex Parte Young*; unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh").

With respect to the second contention, the fact that adjudication of a property dispute against state officials will not quiet title to the land in question is largely irrelevant. For the last 100 years, this Court has held that the fact that a federal court may not have the power to adjudicate the state's title to property does not prevent it from adjudicating who has right to physical possession of that property. *Lee*, 106 U.S. at 222; *Tindal*, 167 U.S. at 223-24; *Treasure Salvors, Inc.*, 458 U.S. at 697 (Stevens, J.).

Moreover, as this Court noted in *Tindal*, a state does not have to stand by while the federal action moves forward. Like any other litigant who feels that its rights are being threatened, a state may always intervene. Should it choose not to, it may "bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute." 167 U.S. at 223. *See Lee*, 106 U.S. at 222 (noting that "the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial" to quiet its title to the land in question).

The argument of the state officials, however, should be rejected for a third, more important reason. To preclude federal courts from adjudicating real property disputes that raise federal law concerns will seriously jeopardize the federal constitutional right to enjoy, own and dispose of property without undue governmental interference. It could very well result in the subjugation of federal law to unconstitutional state policies, practices and laws. As the plurality noted in *Treasure Salvors, Inc.*:

> If a statute of the State of Florida were to authorize state officials to hold [property] in circumstances such as those presented in this case, a substantial constitutional question would be presented. In essence, the State would have authorized state officials to retain property regardless of the manner in which it was acquired, with no duty to provide compensation for a public taking. If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign.

458 U.S. at 697 (Stevens, J.). *See Osborn*, 22 U.S. at 847 (to deny jurisdiction in cases raising questions of federal law would result in the untenable assertion that "the agents of a

State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States").

It will also result in the prioritization of federal constitutional and statutory rights. A real property exception to the *Young* doctrine essentially proclaims that while all rights might be supreme, some are more supreme, and worthy of protection, than others. Federal courts will be able to protect against the deprivation of life and liberty without due process, but unable to prevent the deprivation of property without due process or just compensation.

This Court previously has refused to create such a hierarchy of rights. *See, e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)(citing interdependence between right to liberty and right to property), *Dolan v. City of Tigard*, 512 U.S. __, 114 S.Ct. 2309, 2320 (1994)(acknowledging that the Takings Clause of the Fifth Amendment is as much a part of the Bill of Rights as the First and Fourteenth Amendments). It should not do so now.

II. THE NINTH CIRCUIT PROPERLY HELD THAT THE ELEVENTH AMENDMENT DOES NOT PRECLUDE A FEDERAL COURT FROM ADJUDICATING THE TRIBE'S CLAIM AGAINST THE IDAHO STATE OFFICIALS

The Tribe's claims against Idaho state officials fall squarely within the exception to the Eleventh Amendment created by *Lee*, *Tindal*, *Ex Parte Young* and *Treasure Salvors, Inc*. The Eleventh Amendment does not bar a federal court from adjudicating a claim for prospective injunctive relief against state officials who are allegedly acting contrary to federal law.

Here, the Tribe seeks an injunction enjoining the Idaho

state officials from violating rights allegedly secured to it by an executive order ratified as a federal statute. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d at 1247. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974)(Indian property rights are federal rights). The fact that the state officials, in administering and maintaining the disputed land, may be acting in a manner consistent with a state statute does not deprive a federal court of jurisdiction. *See* States' Brief at 8-9. As the Ninth Circuit stated:

> Because federal law preempts state law, if the property at issue in this case belongs to the Tribe pursuant to federal law, the Officials must conform their actions to that federal law in spite of state statutes that purport to regulate the property as belonging to the states.

42 F.3d at 1251.[7]

The relief sought by the Tribe against the state officials is prospective injunctive relief, consistent with the principles annunciated by this Court in *Edelman v. Jordan*, 415 U.S. 651. In *Edelman*, the Court ruled that the *Young* doctrine only applied to official capacity suits seeking prospective, as opposed to retrospective, relief. Subsequent Supreme Court decisions explained that the *Young* doctrine was not designed to compensate victims for loss, but to prevent future unlawful acts. *See Pennhurst*, 465 U.S. at 105-06; *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). They also explained that the fact than an injunction requiring state officials to conform their future conduct to the requirements of federal law may have an ancillary effect on the state treasury does

[7] Defendants wrongfully analogize this case to one in which state officers are acting pursuant to "admittedly constitutional" state statutes. Pet. Brief at 32. The Tribe has never conceded the lawfulness of the state statutes at issue.

not make it impermissible. *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

Here, the Tribe seeks an injunction prohibiting Idaho state officials from taking any action in the future that violates its rights to the use and occupancy of the land in question. Complaint at 9. As the Ninth Circuit noted, the Tribe "is not seeking damages or restitution for past wrongs nor is it seeking to rescind a past transfer of property." 42 F.3d at 1254-55. *See Treasure Salvors, Inc.*, 458 U.S. at 698-9 (Stevens, J.)(plaintiff's request for possession of disputed property was permissible relief because it did not seek "an attachment of state funds and would impose no burden on the state treasury . . . . [it] is not asserting a claim for damages against either the State . . . or its officials").

That the Tribe's claims are based, in part, on an Executive Order issued in 1873 does not make the relief it seeks retrospective. The continuing act of holding the Tribe's property can be characterized as an ongoing violation of federal law. *See* John F. Duffy, "Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits," 56 U.Chi.L. Rev. 205, 303 n.45 (1989). Pursuant to this Court's decision in *Quern*, the fact that requiring state officials to cede possession of the property to the Tribe may have an effect on Idaho's treasury is immaterial. *See Milliken v. Bradley*, 433 U.S. 267 (1977).

Despite the above, Idaho state officials and their *amici* argue that the Tribe's claims are barred by the Eleventh Amendment because Idaho has a stronger legal entitlement to the property than does the Tribe. Pet. Brief at 18-26; States' Brief at 15-16.[8] As this Court has held, a determi-

[8] In fact, the state *amici* go as far as to assert that the *Ex Parte Young* fiction should not apply to claims that are "frivolous or insubstantial." (continued...)

nation of the merits in order to determine Eleventh Amendment immunity is patently improper. *Treasure Salvors, Inc.*, 458 U.S. at 700 (Stevens, J.)("[i]n making the determination [that the Eleventh Amendment did not bar the execution of the arrest warrant], the court of appeals improperly adjudicated the State's right to the artifacts"). *See id.* at 703 (White, J.)(merging a determination on the merits of the validity of State's claim with resolution of the jurisdiction issue "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses"), *citing Florida Dep't. of State v. Treasure Salvors, Inc.*, 621 F.2d at 1352 (Rubin, J, dissenting). "The possibility that a defendant will ultimately prevail on the merits does not clothe that defendant in Eleventh Amendment immunity." *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d at 1251. *See Scheuer*, 416 U.S. at 238.[9]

Idaho state officials also argue that they are entitled to Eleventh Amendment immunity because the Tribe already has an adequate remedy under state law. They claim that the Tribe may bring a quiet title action against Idaho in state court pursuant to a quiet title law enacted by Idaho's legisla-

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[8] (...continued)
States' Brief at 15. There are a variety of devices to combat frivolous or unsubstantial allegations short of an Eleventh Amendment jurisdictional bar. These devices include motions to dismiss for failure to state a claim, Fed.R.Civ.P. 12(b)(6), and motions for sanctions pursuant to Fed.R.Civ.P. 11.

[9] The *Treasure Salvors, Inc.* decision has been interpreted as holding that the existence of the Eleventh Amendment immunity depends on which party to the litigation has a "colorable" claim to the disputed property. If the state has a colorable claim, then it is entitled to sovereign immunity. *See* Pet. Brief at 19-20, 23-26. *Amici* respectfully suggest that this interpretation of the *Treasure Salvors, Inc.* decision is incorrect. A decision as to which party's claim is more "colorable" necessarily involves a determination of the merits.

ture. Pet. Brief at 26 n.6; States' Brief at 12-13; Council's Brief at 15-19.

This argument must be rejected for a number of reasons. First, this is not a procedural due process case. Thus, the fact that the State may provide the Tribe with a procedural due process remedy is irrelevant. *Cf. Parratt v. Taylor*, 451 U.S. 527 (1981); *Zinermon v. Burch*, 494 U.S. 113 (1990).

Second, the availability of a state forum does not deprive a federal court of jurisdiction. As the Court noted in *Monroe v. Pape*:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

365 U.S. 167, 183 (1961). *See Zwickler v. Koota*, 389 U.S. at 248, *quoting Robb v.Connolly*, 111 U.S. 624, 637 (1884) ("escape from [adjudication of a constitutional claim] is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts ' . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States'").

Should the Court adopt the arguments of the defendant state officials and hold otherwise, federal courts would no longer be the paramount protectors of federal constitutional rights. Each state legislature could prevent those federal courts within its jurisdiction from adjudicating federally protected rights by enacting some sort of state remedial scheme. As this Court has repeatedly recognized, however, Congress intended, with the passage of the 1871 Civil Rights Act, to "'interpose the federal courts between the States and the people, as guardian of the people's federal rights.'" *Patsy v. Florida Board of Regents*, 457 U.S. 496, 503 (1982), *quot-*

ing Mitchum v. Foster, 407 U.S. 225, 242 (1972). *See Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974).[10]

Lastly, under the guise of an immunity argument, the *amici* of the Idaho state officials claim that general equitable principles require a court to abstain from adjudicating this action.[11] Citing *Younger v. Harris*, 401 U.S. 37 (1971), they argue that a federal court should refuse to exercise jurisdiction over the Tribe's claims because "the relief sanctioned by the court of appeals" could result in the ejection of the public from the disputed land, Council's Brief at 12-15, 19-20, "anarchy," *id.* at 24, and "confrontation which breaches the peace." *Id.* at 25. *See* States' Brief at 9-10.

First, *Younger* does not apply in this case. In *Younger*, the Court held that federal courts must abstain from adjudicating actions that will impermissibly interfere with ongoing state court proceedings. 401 U.S. at 41. Here, there is no ongoing state court proceeding with which this action could interfere.

Second, the argument of *amici* presupposes that the Tribe will prevail and that it will take certain actions after it has won the right to control the disputed property. Nothing in the history of the *Young* doctrine suggests that state officers are entitled to sovereign immunity because plaintiffs might win.

Finally, in *Lee*, a case also involving access to land held by the government for the benefit of the public, this Court rejected a similar argument, stating:

> The fact that the property, which is the subject of this controversy, is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession, even by one who proves a clear title to that possession. In this connection many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are a supposed seizure of vessels of war, invasions of forts . . . . Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

106 U.S. at 217.

Thus, the Eleventh Amendment does not bar the Tribe's claims against the defendant state officials for injunctive and declaratory relief.

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[10] The fact that the United States may bring suit on behalf of the Tribe as its trustee also does not deprive a federal court of jurisdiction. As this Court has noted, there may be circumstances where the United States is either unable or unwilling to bring such a suit because of a conflict of interest or a lack of resources or political will. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 560 n.10 (1983); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784-5 (1991)(Blackmun, J., dissenting); *see also* 28 U.S.C. §1362. In this case, for example, although the United States has filed an action on behalf of the Tribe, it only seeks to quiet title to approximately a third of the land covered by this suit. *See United States v. Idaho*, No. 94-0328 (D. Idaho)(complaint filed July 21, 1994).

[11] Defendants also argue that this case is analogous to *Oregon v. Hitchcock*, 202 U.S. 60 (1906), and *Louisiana v. Garfield*, 211 U.S. 70 (1908), real property disputes against the United States government involving questions of federal statutory interpretation in which the Court refused to employ the officer suit fiction. Pet. Brief at 32-34. Defendants are wrong. The Court refused to adjudicate these suits because they essentially sought to review discretionary acts by the executive, a co-equal branch of government and, therefore, presented what today would be called "political questions." *See Baker v. Carr*, 369 U.S. 186, 208-29 (1962).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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